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# INTERSTATE PREEMPTION: THE RIGHT TO TRAVEL, THE RIGHT TO LIFE, AND THE RIGHT TO DIE

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State laws differ, and they differ on issues of tremendous importance to the ways that we conduct our lives. Abortion and the right to die are two issues on which state law intersects with deeply held moral convictions, and on which state laws vary.<sup>1</sup> With so much hanging in the balance, it is not surprising that those who find themselves outvoted or outmaneuvered in local political processes sometimes seek a legal climate more compatible with their beliefs about human decency and dignity. The right to “vote with one’s feet” — to travel or move to another state and trade a law one finds repugnant for a better one — is defined and circumscribed by the constitutional limitations peculiar to the conflict of laws.

The relevance of conflicts to the abortion issue is as follows. To the extent that our courts continue to read the U.S. Constitution as including a right to abortion, no conflicts analysis is needed because state law is uniform.<sup>2</sup> To the extent that the Court decides to relegate control over abortion to the states, however, conflicts issues resurface. The question then arises whether one state can apply its law to abortions that have connections with other states. In particular, a state that outlaws abortions might attempt to prohibit its residents from traveling to states where abortions are legal and terminating their pregnancies there. Criminalization would most likely not take the form of an outright prohibition on leaving the state, but would rather

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1. Another important moral issue that raised questions of the conflict of laws was slavery. *See, e.g., Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

2. Of course, there may still be variations in state laws on abortion even given a basic right of reproductive choice. Some states may have parental consent laws, for instance, that other states decline to adopt. Uniformity is guaranteed only to the extent that federal law mandates some particular outcome.

involve the penalization of conduct undertaken while in the other state. Other conflicts problems may arise out of abortion — whether a state can prohibit advertising abortion services within its borders when the abortion itself would take place in a state where abortion is legal; whether a state can prohibit nonresidents from using its abortion clinics; and so forth — but the residence problem seems most likely to pose frequent and substantial problems.<sup>3</sup> This article asks, then, whether states can regulate the reproductive activities of local residents when they are temporarily present in other states.

The right to die intersects with conflict of laws in similar ways. In 1990, the Supreme Court upheld a Missouri law that prevented the parents of Nancy Cruzan, who lay in a permanent vegetative state, from disconnecting her life support system.<sup>4</sup> Other states were apparently more willing to recognize a “right to die.”<sup>5</sup> But in a case remarkably similar to *Cruzan*, Missouri subsequently took the position that a father could not remove his daughter from the hospital for purposes of taking her to Minnesota, a state that would afford greater discretion in allowing her to die.<sup>6</sup> The right-to-die issue is most closely analogous to the abortion issue in cases where the patient has already gone or been taken to another state, and the home state seeks to prevent family members or the guardian from helping to terminate her life by threatening to prosecute them when they return. Again, the question is whether people’s home states can regulate their activities when they are temporarily present in a place where those activities are legal.

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3. The issue of nonresident access to abortion services might seem resolved by *Doe v. Bolton*, 410 U.S. 179 (1973), which held that Georgia could not prohibit nonresidents from using its abortion clinics. But it is arguable that *Doe* would not apply in a post-*Roe* world. A state might claim that its refusal of access to nonresident women constituted deference to the laws of the woman’s home state, which prohibited abortion. *Cf. Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding a one-year residence requirement for divorce in part because Iowa might legitimately wish to discourage nonresidents from going to Iowa to avoid their home state’s onerous divorce requirements). The use of durational presence may still be unsettled. *See, e.g., ALASKA STAT. § 18.16.010(a)(4)* (1991) (requiring a woman to be physically present or domiciled in the state for thirty days before obtaining an abortion).

4. *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990).

5. *See, e.g., Rasmussen v. Fleming*, 741 P.2d 667, 670-72 (Ariz. Ct. App. 1986) (upholding right to die and substituted judgment of guardian), *modified*, 741 P.2d 674, 681-90 (Ariz. 1987) (affirming right to die; limiting guardian’s discretion); *McConnell v. Beverly Enter.-Conn., Inc.*, 553 A.2d 596, 600-04 (Conn. 1989) (upholding right to die); *In re Guardianship of Browning*, 568 So. 2d 4, 10-12 (Fla. 1990) (upholding right to die); *see also ALA. CODE §§ 22-8A-1 to 22-8A-10* (1990); *CAL. HEALTH & SAFETY CODE §§ 7185-95* (West Supp. 1993); *IND. CODE ANN. §§ 16-8-11-1 to 16-8-11-22* (West 1992); *MD. HEALTH-GEN. CODE ANN. § 5-601 to 5-614* (1990).

6. *In re Busalacchi*, No. 59,582, 1991 WL 26851 (Mo. Ct. App. Mar. 5, 1991); *see also Tamar Lewin, Man Is Allowed to Let Daughter Die*, N.Y. TIMES, Jan. 27, 1993, at A7 (reporting that the Missouri Supreme Court ultimately dismissed the case, allowing the father to remove the feeding tube).

This article argues that, although the answer may depend upon the precise contours of state regulation, at least in the abortion and right to die cases states typically cannot regulate their citizens' conduct in this way. States do possess the power to regulate their citizens' conduct in other states in the usual case. I will argue, however, that abortion (and, analogously, the right to die) is not "the usual case." Most states that choose not to prohibit abortion to the extent constitutionally permissible are not merely expressing a simple lack of interest in the abortion issue. They are, instead, affirmatively granting to those within their borders the freedom to make the choice whether to have an abortion.

If that is the policy that most states' prochoice laws express, then a prolife state's attempt to prohibit abortions extraterritorially clashes directly with the territorial state's desire to ensure freedom of choice. Such regulation is constitutionally invalid because, in cases of direct conflict, territoriality (the place where the abortion is performed) trumps residence (the place where the woman resides). Similarly, states recognizing a right to die are probably granting an affirmative freedom to those who choose to end their lives; extraterritorial regulation by states who fail to recognize that freedom is thus prohibited.

But how can one be so sure that a failure to prohibit abortion or termination of life constitutes an affirmative grant of freedom — a license, so to speak — rather than a simple lack of interest in the subject? Indeed, is there even a discernable difference between a state's grant of an affirmative license to make up one's own mind and a state's simple failure to regulate? In order to clarify the difference, I rely on an analogy to federal preemption. Often, states seek to penalize something that the federal government has chosen not to prohibit. Sometimes such a penalty is permissible, but sometimes the state's efforts are preempted. It all depends on whether the federal failure to regulate represents a deliberate federal policy choice to allow a freedom, in which case the state law is preempted, or whether Congress simply failed to regulate out of indifference.

The preemption cases show how to determine whether federal and state law are truly inconsistent, and in this way they offer a guide for deciding whether two states' laws conflict. The abortion example, according to this analogy, supports a relatively easy argument for preemption of the residence state's restrictive law. *Roe v. Wade*<sup>7</sup> clearly preempted state efforts to regulate abortion because it recognized a right to choose; therefore, the residence state's efforts to bar abortion

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7. 410 U.S. 113 (1973).

would be invalid in any state having a *Roe*-like prochoice law. The analogous right-to-die argument seems equally compelling.

The abortion issue, of course, may soon become moot: with Democrats in the White House, a federal freedom-of-choice statute may become law. Even if a federal statute is passed, however, it may leave some areas of regulation, such as waiting periods or parental notification provisions, to the states. Moreover, in other areas of state regulation of personal morality — the right to die is only one example — no unifying federal legislation looms on the horizon.

And with disuniformity, conflicts will arise, for states might try to regulate their citizens' activities abroad. Furthermore, state legislation need not provide specifically for extraterritoriality for constitutional choice-of-law problems to occur. All it would take would be for one energetic public prosecutor in an antiabortion state to identify and decide to prosecute a woman who had left the state to terminate her pregnancy,<sup>8</sup> or for one energetic prosecutor to charge with murder those who helped to carry out the patient's wish to die. With few clear constitutional precedents available to argue either way, the precise issue might seem at first to be an open one. I believe and argue here, however, that the structure of our federal system clearly compels the priority of the territorial state, and that this priority typically invalidates the residence state's claim to regulate.

The argument proceeds in several stages. First, I briefly outline the general principle that a state may in most circumstances apply its law to its residents, even when they are acting outside the state. I argue next that, where there is a direct clash between the state of residence and the territorial state, the general principle yields, and territoriality trumps residence. Third, I claim that abortion involves just such a clash because many states wish deliberately to preserve for women the right to choose abortion. The residence and territorial states' policies thus collide. Prochoice laws, in other words, have "preemptive effect" on the residence state's antiabortion laws. I focus mainly on abortion because that is where state law has most fully developed.

Next, I introduce the analogy to federal-state preemption. In the same way that a U.S. constitutional decision to grant freedom of choice preempts state laws that prohibit abortion, most states' deci-

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8. In a well-publicized Irish case, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 57 C.M.L.R. 689 (Ir. S.C. 1989), a prosecutor sought to prohibit a young rape victim from leaving for England to obtain an abortion. The Irish Supreme Court ultimately ruled her free to go, but only on relatively narrow grounds that left the general right to travel issue unresolved.

The various attempts by states to regulate abortions occurring in other states are described in Seth F. Kreimer, *The Law of Choice and Choice of Law*, 67 N.Y.U. L. Rev. 451 (1992).

sions to permit abortion would preempt sister states' attempts to regulate abortions extraterritorially. The following section looks at particular state laws allowing freedom of choice to assess which have preemptive power — because they grant an affirmative right — and which do not — because they exhibit mere indifference. On examination, as a matter of state law, the laws of the typical prochoice state would appear to bar the extraterritorial application of prolife regulations. I close with some somewhat speculative remarks about the right to die.

### I. THE RESIDENCE PRINCIPLE

States are not constitutionally free to apply their laws whenever they choose; application of local law is limited by the Due Process, Commerce, and Full Faith and Credit Clauses.<sup>9</sup> No single connecting factor uniquely validates the forum's claim to apply its law; different contacts are relevant in different sorts of cases. Among the various contacts that have been used to justify application of a particular body of law are the place where a contract was signed, the place where an accident occurred, the place of employment, the location of defendant's unrelated business, and the residence of the regulated party.<sup>10</sup> This last connecting factor is of primary interest here.

A variety of legal doctrines reflect the general constitutional sufficiency of the residence factor as a basis for assertion of state authority.<sup>11</sup> The defendant's residence, of course, is a constitutionally adequate contact for personal jurisdiction.<sup>12</sup> It is also one of the rec-

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9. U.S. CONST. amend. XIV, § 1; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. IV, § 1.

10. The residence of the party who would benefit from the application of local law is another possibility. The Court has at various times alluded to this contact as a relevant connecting factor, but no Supreme Court case upholds application of local law on this ground alone. For discussion of these factors, see generally LEA BRILMAYER ET AL., *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* 267-73 (1986).

11. In an earlier article, I discussed the different philosophical bases for jurisdiction based on local residence and jurisdiction based on local activities. See Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 *DUKE L.J.* 1 (1991). When a state applies its laws to its own people, it relies on a communitarian political philosophy; when it applies its laws to activities occurring in the state, or impact transpiring in the state, it relies on a liberal "tacit consent" theory of political philosophy. This difference in philosophical foundations may account for why so many Americans seem to assume that leaving one's home state frees one from home-state laws. To the extent that people adopt a liberal consent-based theory of jurisdiction, and overlook the possibility of communitarian justifications, they will find the home state's power to apply its law to an absent defendant illogical. A liberal believes that people voluntarily enter into legal obligations and can voluntarily set them aside; thus, one should incur legal obligations by entering the state and relinquish them by leaving it. To a communitarian, one's obligations remain so long as one is a member of the community.

12. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).

ognized bases for regulation in international law.<sup>13</sup> The United States drew upon this principle in its attempt to punish Bobby Fischer for playing chess in Yugoslavia in violation of the international embargo.<sup>14</sup> In domestic U.S. law, the best-known case upholding a state's right to regulate its absent residents is *Skiriotes v. Florida*.<sup>15</sup> *Skiriotes* involved a Florida law that prohibited using scuba gear to gather sponges. The defendant claimed that he had been outside the territorial waters of the state when he harvested sponges, but the Supreme Court held his defense irrelevant. The fact that he was a Florida resident provided an adequate nexus for imposition of the Florida criminal prohibition.<sup>16</sup>

Despite the general principle that residence is an adequate basis for state regulation, many people assume that one can escape the law of one's residence by simply leaving the state temporarily.<sup>17</sup> Perhaps this assumption dates to the era of the Nevada divorce, which provides a deceptive analogy to interstate abortion. At one time, most states were quite restrictive in granting divorces; a small number of states, including Nevada, were considerably more lenient. This led to a booming divorce business in Nevada, as individuals from other states traveled there, obtained their divorces, and then returned home. One would expect the same sort of "forum shopping" to occur if the Supreme Court freed prolife states to regulate abortion as they saw fit. Women desiring abortions but living in antiabortion states would travel to the latter-day Nevada of their choice, obtain abortions, and return home. It was always thus in the days before *Roe v. Wade*.

One obvious consequence of such arrangements is that those with knowledge of prochoice states and money for travel can obtain abortions, while those who are less informed or less well endowed cannot. This was true prior to *Roe*; the poor had no recourse but the back alley. The same was true regarding divorce; only the well-off could

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13. RESTATEMENT (THIRD) OF UNITED STATES FOREIGN RELATIONS LAW § 402(2) (1987).

14. See Stephen Labaton, *Fischer Is Indicted Over Chess Match*, N.Y. TIMES, Dec. 16, 1992, at A3.

15. 313 U.S. 69 (1941); see also *Blackmer v. United States*, 284 U.S. 421 (1932) (addressing extraterritorial application of the federal subpoena power).

16. 313 U.S. at 76-77. In *Skiriotes*, the defendant was not present in another state when the crime was committed; he was in international waters. The relevance of this point will be discussed *infra* text accompanying notes 23-24.

17. See, e.g., Steven Prokesch, *New York State Crosses Hudson in Search of Taxes*, N.Y. TIMES, Dec. 9, 1992, at B5 (describing shock and outrage when New York shoppers in New Jersey stores were told that New York intended to impose sales tax on their out-of-state purchases); cf. *supra* note 11 (discussing philosophical basis for such an assumption).

afford the trip to Nevada. The importance of this differential impact on the poor should not be underestimated.

But abortion rights activists who focus solely on the cost factor are overlooking another important issue. What worked with divorce may not work with abortion, because Nevada divorces required at least a technical change in domicile. Nevada law required the dissatisfied spouse (often the husband) to travel to Nevada and then stay there long enough to acquire a new (if admittedly merely technical) domicile.<sup>18</sup> To require a woman seeking an abortion to remain in a state long enough to acquire a new domicile is quite an imposition, particularly if the pregnancy is already somewhat advanced and delay raises health and safety as well as cost issues. Of potentially even greater importance, divorce is a judicial procedure; abortion is a medical procedure. The spouse who obtains a Nevada divorce gets a judicial declaration confirming her new domicile, which is entitled to at least a degree of full faith and credit.<sup>19</sup> The woman who obtains an abortion gets no judicial finding of domicile and thus no full-faith-and-credit protection of any kind. She returns to her home state in fear that the authorities will discover her abortion and prosecute her.

The most plausible concern of women traveling to other states to obtain an abortion, therefore, is that the state of residence will apply its criminal prohibition to her on the grounds that her domicile never changed. The Nevada divorce analogy does not protect her from this possibility. Of course, a state may have difficulty finding out about abortions performed out of state and prosecuting after the fact. But such prosecutions are far from impossible. The woman's spouse, boyfriend, or parent may seek to prevent the abortion by threatening to go to the authorities afterwards, or a prolife group might publicize the names of women who visit abortion clinics in other states. The added burden of fear and secrecy that results from the likelihood that a woman's home state may discover and prosecute her is far from insubstantial.<sup>20</sup>

The home state of a terminally ill individual could use similar ar-

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18. On domicile as a basis for divorce jurisdiction, see *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*). A residence period of one year was upheld in *Sosna v. Iowa*, 419 U.S. 393 (1975). The Nevada divorce upheld in *Williams I* required a residence of only six weeks. 317 U.S. at 290 n.3.

19. *Williams v. North Carolina*, 325 U.S. 226 (1945) (*Williams II*), allowed relitigation of the domicile issue by the state in a subsequent bigamy proceeding. The state was not foreclosed because it had not been a party to the earlier case. However, the Court recognized a presumption that the prior finding of domicile was correct; the challenger would bear the burden of proof. 325 U.S. at 233-34; see also *Cook v. Cook*, 342 U.S. 126 (1951).

20. See Kreimer, *supra* note 8 (describing efforts by prolife states to harass women obtaining abortions elsewhere).



guments if the individual sought physician-assisted suicide or termination of life support in another state. In such cases, of course, the state would almost certainly not prosecute posthumously if the individual were successful. However, anyone who assisted the suicide could be subject to prosecution under the residence principle if he or she were a resident of the individual's home state. The situation becomes more complicated if the assistant is not a resident of that state, or if the state seeks to prevent the patient from leaving in the first place. We will return to these complications later.<sup>21</sup> The underlying principle of residence-based extraterritoriality, however, seems unchanged from the abortion context.

The practical importance of the residence principle, then, should not be underestimated. While there is no case directly on point,<sup>22</sup> colorable support exists for the conclusion that a state may regulate its citizens who have abortions or terminate their lives elsewhere. *Skiriotes*<sup>23</sup> plays a central role in this prima facie argument. Yet *Skiriotes* contains a key element on which we have not yet focused. In *Skiriotes* the activity in question took place outside the territorial waters of the state, but not within the jurisdiction of any other state of the Union.<sup>24</sup> There was, in other words, no territorial state. In the abortion and right-to-die contexts, in contrast, there *is* a territorial state, and thus a real possibility of a clash of policies. In *Skiriotes*, all that was required for application of forum law was that the forum exhibit a nexus with the dispute; no other state could also have a nexus, so the interests of two states could not directly collide. The fact that *Skiriotes* did not address such conflicts between two states leaves us the question of what to do when such a conflict does occur.

## II. WHY TERRITORIALITY TRUMPS RESIDENCY

Should a state be able to apply its law simply because it has a nexus with the controversy in question, regardless of the connection between the controversy and other states? If the answer is yes, then states should be free to regulate the reproductive activities or deaths of their citizens even when they are temporarily absent from the state; the nexus is the individual's residence. But focusing solely on the exist-

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21. See *infra* Part VI.

22. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court suggested in dictum that Virginia could not prevent its citizens from going to New York to obtain abortions. 421 U.S. at 822-24. However, *Roe*, 410 U.S. at 113, which had been decided during the pendency of the litigation, was one possible explanation for this assertion. If *Roe* were reversed, the *Bigelow* argument might therefore be invalid.

23. *Skiriotes v. Florida*, 313 U.S. 69 (1941).

24. 313 U.S. at 76-79.

ence of a geographical connection with the dispute opens the prospect that several states might each have jurisdiction over the same dispute; both the residence and the territorial state might have legislative authority.<sup>25</sup>

Where concurrent jurisdiction poses constitutional problems, the mere fact that a nexus exists may not produce an adequate basis for applying forum law. There are two key issues in assessing the constitutionality of concurrent jurisdiction: whether the various states' laws directly clash, and whether a way exists to prioritize the contending laws to determine which one should trump.<sup>26</sup> I illustrate the first issue — inconsistent regulation — by some recent Supreme Court cases applying the Commerce Clause to interstate disputes; I illustrate the second — prioritizing — by the Court's discussion of full faith and credit.

While inconsistent state regulation has occasionally surfaced as a due process theme,<sup>27</sup> it has figured more prominently in applications of the Commerce Clause.<sup>28</sup> An early set of cases examined the efforts of states to regulate trucks that traveled across the state.<sup>29</sup> In one, the

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25. This statement actually simplifies the problem somewhat, because it considers only a single residence factor and a single territorial factor, as if our choice between residence and territoriality were enough to resolve the problem of concurrent jurisdiction. In fact, there are several possible residence factors (residence of the patient, residence of the doctor, corporate affiliation of the hospital, and so forth) and several possible territorial factors (place where the abortion or death takes place, place where the decision is made, place where the patient or fetus would have continued to live, and so forth).

I focus here on the two most likely candidates: the place of the abortion or death, and the residence of the woman or patient. More precisely, I mean to argue that, where concurrent jurisdiction is impermissible, only one state may govern, and that should be the state where the abortion or death takes place. All of the reasons for disallowing an additional state to regulate apply equally for other sorts of territorial factors and other sorts of residence factors.

26. I prefer to talk about direct clash rather than "conflict" because the latter word has come to have something of a technical meaning in the conflicts literature. In modern choice-of-law theory, *conflict* tends to be assessed by reference to Brainerd Currie's theory of interest analysis. See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). As I will explain in the discussion below, however, my determination whether a direct clash exists does not have very much in common with Currie's analysis of whether a "true conflict" exists. In particular, the discussion below attaches great importance to territorial connecting factors and territorial sovereignty. Currie relied almost entirely on residential, as opposed to territorial, connecting factors. See *id.* at 703 (the concern of the state is with people, not locations); see also Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 395-97 (1980) (discussing reliance on domicile). In addition, Currie thought of states as having interests only in applying their laws to benefit local parties. See Brilmayer, *supra*, at 398 (arguing that residents get the best of both worlds); John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 274 (1992). Here, residence factors are used to penalize forum residents.

27. See, e.g., *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

28. For a discussion of inconsistent state regulation, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 434-36 (2d ed. 1988).

29. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); cf. *Southern Pac. Co. v. Arizona ex rel. Sullivan*,

forum had a regulation requiring trucks to be equipped with a certain sort of mud flap.<sup>30</sup> Because other states either did not require or even prohibited such mud flaps, the law in question posed the threat of inconsistent regulation. The forum certainly had a "nexus" with the dispute; the trucks were traveling along its highways. The problem stemmed not from a lack of nexus, but from the fact that too many states seemed to have a claim to regulate: there was concurrent jurisdiction. As a theoretical matter, perhaps trucks could have stopped at the border and changed their equipment; practically speaking, however, this was not feasible.

Two recent sets of Commerce Clause cases, one dealing with state takeover regulation and one dealing with regulation of liquor pricing, also illustrate the importance of the inconsistent regulation theme. In the takeover context, the Court based its holding that only one state might regulate corporate takeovers in part on the fact that multiple states might impose inconsistent requirements on interstate takeovers.<sup>31</sup> Similarly, in the liquor pricing cases, the Court invalidated a state's attempts to regulate "extraterritorially" in part because of the possibility that one state would impose a set of prices that another state prohibited.<sup>32</sup>

Of course, invalidating concurrent jurisdiction is problematic if a court has no way to determine which of the contending states has a superior claim to regulate. This brings us to our second key issue in determining whether a particular exercise of concurrent jurisdiction is constitutionally appropriate: is there a way to prioritize? An early full-faith-and-credit case illustrates this issue.<sup>33</sup> At one point the Court had appeared to hold that concurrent jurisdiction was never appropriate — that a single state (the place of contracting, or the place where the tort occurred) was uniquely qualified to apply its law.<sup>34</sup> In clarifying that concurrent jurisdiction was no longer generally impermissible, the Court noted that eliminating concurrent jurisdiction required a way of determining which state had the superior claim to apply its law, a way that the Court did not have on the particular facts

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325 U.S. 761 (1945) (involving regulation of railroad cars). See generally LEA BRILMAYER, CONFLICTS OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 124 (1991).

30. See *Bibb*, 359 U.S. at 520. Illinois required contoured rear-fender mudguards; Arkansas actually prohibited them.

31. See *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982); see also *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987).

32. See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-40 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583-84 (1986).

33. See *Alaska Packers Assn. v. Industrial Acc. Commn.*, 294 U.S. 532 (1935).

34. See, e.g., *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 213-14 (1922) (applying "place of contracting" rule).

at issue.<sup>35</sup> Absent a priority rule, the prohibition on concurrent jurisdiction would simply have required each state to defer to the law of the other state.<sup>36</sup> If the case were brought in state *A*, then the *A* courts would have to apply state *B*'s law; if brought in state *B*, then *B* would have to apply *A*'s law. The Court denied that the Full Faith and Credit Clause could be read to compel such a strange result.<sup>37</sup>

Having mentioned due process, the Commerce Clause, and full faith and credit, the natural question is what to make of the right to travel. Intuitively, this seems to be the constitutional protection that tracks most closely the defendant's claim to escape home-state law by leaving the state.<sup>38</sup> The obvious problem with relying directly on the right to travel in the abortion context, however, is that the state is not denying anyone the right to leave its borders; nor is it even creating a disincentive to leave. It is merely saying that, when one is absent from the state, one must nonetheless obey state law.

In a sense, then, the right-to-travel argument is parasitic upon the claim that the home state cannot regulate extraterritorially. The right-to-travel argument works only so long as it rests on a state's underlying inability to regulate the resident's activities in other states. Surely, if the home state is not entitled to apply its law extraterritorially, then it may not condition leaving the state upon agreeing to obey state law while absent. On the other hand, if the state were entitled to regulate extraterritorially, then the right to travel would not seem to impose an additional bar.<sup>39</sup> To put it another way, the "right to travel" by itself does not specify which law will apply once one gets to the other state. To decide this issue, we must consult the constitutional limits on extraterritorial application of local law — and here, again, the most directly relevant provisions are due process, full faith and credit, and the Commerce Clause.<sup>40</sup>

The constitutional limits on concurrent jurisdiction, as just noted,

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35. See *Alaska Packers*, 294 U.S. at 547.

36. Or, conceivably, neither state should be allowed to regulate. This solution has little to recommend it.

37. *Alaska Packers*, 294 U.S. at 547.

38. See Seth Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortion*, 91 MICH. L. REV. 907 (1993).

39. For example, even those who rely upon the right to travel allow the state to prohibit action having a direct impact in the home state. See *id.* at 921-22. For instance, assume that a resident of state *A* travels into state *B* and then fires a gun across the border into state *A* to kill his ex-lover. Surely state *A* does not violate the right to travel by prosecuting for murder, because *A* has an underlying right to criminalize the conduct in question.

40. I will return to the right to travel in my discussion of the right to die. See *infra* Part VI. For even if a state cannot criminalize physician-assisted suicide in another state, it may try to prevent the patient from leaving; at this juncture, the right to travel once again becomes directly relevant.

turn on whether policies directly clash and whether some way exists to prioritize the two states seeking to regulate. I will turn to the issue of whether a direct clash exists in the next section. Regarding the second issue — prioritization — a clear answer exists. At least for abortion cases, territoriality trumps residence.<sup>41</sup> As a general matter, applying the territorial state's law usually makes sense when two sets of policies are inconsistent.<sup>42</sup> Particularly in the abortion context, though, the territorial state's claim to regulate is paramount; indeed, states, if forced to choose, would probably exercise their territorial authority and give up their residence-based authority.

Three approaches are possible when concurrent jurisdiction is unworkable: one might favor the territorial state categorically; one might favor the residence state categorically; or one might make some kind of case-by-case assessment. The last alternative has obvious problems. A court could perform case-by-case assessments either by applying some balancing test that considered both residential and territorial factors<sup>43</sup> or simply by allowing the forum to apply its own law. Neither method provides the prospective defendant with enough certainty to predict which rule will govern her conduct. The problem is particularly acute in the case of criminal law for two reasons. First, our legal system justifiably emphasizes predictability where criminal penalties are at stake. Second, because there is no issue preclusion in interstate criminal law — the Double Jeopardy Clause does not bar all sequential criminal prosecutions in different states<sup>44</sup> — an amorphous balancing test or one allowing each state to apply its own law would effectively permit successive prosecutions under inconsistent laws.<sup>45</sup> Where one state's law directly required what the other expressly prohibited, defendants would be subject to inconsistent commands. Where, closer to the issues at hand, one expressly licensed what the other prohibited, potential defendants could protect themselves only

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41. I will argue that a clear priority rule also exists for right-to-die cases. See *infra* Part VI.

42. There has been a resurgence of interest in territorialism. The article that will surely become the classic modern defense of territoriality is Laycock, *supra* note 26, especially Part IV, at 315. See also David S. Welkowitz, *Pre-Emption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1 (1992); compare *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972) (adopting territorial rules in case of conflict); Ely, *supra* note 26, at 217 (turning to territorial rules where no common domicile exists). See also Kreimer, *supra* note 8.

43. For example, the Supreme Court might require states to use the "most significant relationship" test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

44. *Heath v. Alabama*, 474 U.S. 82, 87-93 (1985). Note that two different parties — the two states — are involved, so that issue preclusion does not bar the state from bringing the second prosecution under the Due Process Clause.

45. Compare the problems with applying the "domicile" test in interstate estate taxation. See generally BRILMAYER ET AL., *supra* note 10, at 387. The vagueness of the domicile test potentially submits the estate to multiple taxation.

by conforming to the more restrictive rule. This outcome would consistently subordinate the licensing policy of the first state, violating the principle of sovereign state equality. This solution works only to the extent that one is content to throw the licensing state's policy to the wolves.

This leaves us with a choice between allowing the residence state to regulate and allowing the territorial state to regulate. As a general matter, reasons exist to prefer territorially based regulation.<sup>46</sup> Residence-based regulation is problematic where a single rule must decide the legal rights of more than one person, because the individuals may hail from different states. In civil suits, for instance, courts must use the same rule to adjudge the rights of both the plaintiff and the defendant, because the award that the plaintiff receives is no more and no less than the judgment that the defendant must pay. The Court cannot apply the residence law of the plaintiff to the plaintiff and the residence law of the defendant to the defendant. Territoriality is generally preferable because location is one thing that the two interacting parties typically have in common.<sup>47</sup>

To solve this problem, one might decide that the law of residence of the plaintiff (or of the defendant) governs. But this means imposing nonresidence law on the other party. It creates uncertainty for the other party, who must then investigate the residences of those with whom she deals or interacts before engaging in any conduct with potential legal consequences.

Virtually any method of choice of law has some unpredictability to it; the solution I offer below has "play in the joints" as well.<sup>48</sup> In addition, some contexts certainly exist in which courts resolve concur-

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46. One might be inclined to ask whether this argument would give Nevada a right to divorce out-of-staters without their first acquiring a new domicile: Nevada might adopt a "right to divorce" provision granting an affirmative right to choose to be single. The reason that Nevada cannot do this is *not* that Nevada law would conflict with home-state divorce law (although a conflict would exist). Rather, the problem is that Nevada has no jurisdictional nexus sufficient to grant a divorce if the plaintiff has not acquired a Nevada domicile. Nevada is not the "territorial state" in such circumstances; it is simply a naked forum with no basis for applying its law. The same is true where two parties leave their home state to get married elsewhere. In both the divorce and marriage cases the supposedly territorial occurrence is a naked legal act; in the abortion case, in contrast, the territorial event is a medical procedure.

A prolife state might, perhaps, argue that abortion is a naked legal act — that the territorial state is nothing but a forum. But, if they were correct that the territorial state had no jurisdictional nexus adequate to apply its own law, then they would have to cease banning abortions within their own territories. This they are undoubtedly unwilling to do, thus illustrating the importance that prolife and prochoice states alike attach to territoriality.

47. Of course, telephone transactions and other interactions where the parties do not meet face to face present more difficult questions. See BRILMAYER, *supra* note 29, at 226-27 (contending that territorial rules can be fairly applied to both parties in face-to-face transactions).

48. This is particularly true when the courts of one state must assess whether the other state's law amounts to an affirmative license or merely a failure to regulate.

rent jurisdiction in favor of residence-based regulation.<sup>49</sup> One therefore cannot categorically claim that territoriality trumps residence in all cases. Furthermore, one could argue that the abortion context presents none of the problems that plague residence-based regulation. The prolife state that wishes to regulate the reproductive activities of its citizens extraterritorially might eliminate all third-party problems by relinquishing any claim to regulate the doctors or hospital staff, instead criminalizing only the conduct of women seeking abortions. In so doing, the state would avoid uncertainty problems; for each woman would know her state of residence and its laws, and the conduct of third parties would not be affected.

In fact, however, if we are to eliminate concurrent jurisdiction by singling out a unique, constitutionally adequate connecting factor, the abortion context presents a compelling case for territorial rather than residence-based regulation, for prolife states are undoubtedly unwilling to give up the right to regulate abortions within their own borders.<sup>50</sup> If the residence of the woman were chosen as a unique connecting factor,<sup>51</sup> then prolife states would have to allow nonresident women to have abortions in local medical facilities. The fact that prolife states have been unwilling to do this demonstrates the importance of territorial regulation in the abortion context. Indeed, the fact that prolife states first concentrated on eliminating abortions that take place within the state, and only now seem to be recognizing the potential for regulating local women who seek abortions elsewhere, suggests the primacy of territoriality in the abortion context.

One might argue that the prospect of having to open their hospitals to nonresident women seeking abortions would not seriously deter prolife states from espousing a residence-based test. How many such cases could there be? If states really wanted the option of preventing local women from having abortions, they presumably would be better off opening their hospitals in theory, for why would a woman from a prochoice state go to a prolife state to have an abortion?

But this objection is mistaken. It assumes that the only reason one

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49. See, for example, the internal affairs doctrine, which allows only the state of incorporation to regulate a corporation's questions of internal governance. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

50. A recent referendum in Ireland proposed both loosening the restrictions on abortion and permitting a right to travel to other countries to obtain an abortion. Interestingly, the voters rejected the former but approved the latter, suggesting that states care more deeply about regulating abortions on their own territory than about regulating their resident's reproductive activities elsewhere. See Alan Cowell, *Challenge to the Faithful*, N.Y. TIMES, Dec. 27, 1992, § 6, at 10, col. 1.

51. Note that the state could not additionally base regulation on the residence of the doctor, without recreating the problem of concurrent jurisdiction.

would choose an out-of-state hospital is that it is out of state. In fact, the out-of-state hospital may well be the closest hospital, or the cheapest one, or the best one, or the one nearest supportive family or friends. If Pennsylvania's only basis for regulating abortions were the residence of the pregnant woman, then Planned Parenthood could set up abortion clinics in Philadelphia to cater to low-income women from Camden, New Jersey. But surely a Pennsylvania desire to regulate the reproductive activities of Pennsylvania women while temporarily out of state does not imply a corresponding willingness to let New Jersey women get abortions in Philadelphia.

The source of the intuition that abortion regulation should be residence-based, and not territorial, may be the general assumption that the law of the party's domicile typically governs family law matters.<sup>52</sup> Abortion seems to be a family law issue. But abortion implicates two competing conflicts paradigms: family law, which is ordinarily residence-based; and health-care regulation, which one would expect to be territorial. If forced to decide, the prolife state would most likely choose the health-care paradigm and regulate territorially, if only because territorially based regulation is easier to enforce.<sup>53</sup> Whether or not territoriality trumps residence as a general matter, then, it seems to trump in the case of abortion; for states themselves perceive a stronger interest in regulating abortions going on within the state.<sup>54</sup>

The prolife objective, one suspects, would be recognition of at least two different bases for prohibiting abortion — territorial location of the abortion, and the residence of the woman — either one of which would suffice.<sup>55</sup> But the prospect of multiple bases for regulation is

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52. RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 228-30 (2d ed. 1980) (divorce jurisdiction based on domicile); *id.* at 240-45 (alimony and support can be awarded by the state of marital domicile); *id.* at 256 (traditional rule was that only state of child's domicile could determine custody).

Another reason for the intuition is the fact that a test based on territoriality allows women to evade local law. The problem with this argument is its failure to recognize that the state achieves one of its policy objectives by forcing women to obtain their abortions out of state. To the extent that states object to performance of abortions on their own territory, they achieve their goals when those abortions move to other locations. Thus, a territoriality test allows each state to achieve one of its policy goals — regulating health care within its borders — even if it must sacrifice one of its other policy goals — regulating the reproductive activities of its residents.

53. The state would have great difficulty in tracing abortions occurring out of state, plus it would have more difficulty in obtaining the necessary witnesses and evidence for a conviction.

54. *Cf.* BRILMAYER, *supra* note 29, at 145-89. There, I argue that choice of law is not a zero sum game; that states may both gain if they cooperate in deciding which states' laws should apply to which cases. By cooperating, they can allocate to each state the cases that it "cares about" the most. Here, the argument is that states care most about the abortions that occur within their territories. Therefore, all states would gain by relying on this factor rather than the residence of the pregnant woman.

55. The prolife state would no doubt claim that it must be able to base jurisdiction on both factors, because otherwise women will be able to evade local law simply by traveling to another



precisely what gives rise to the potential for concurrent jurisdiction, because prochoice states would undoubtedly also like the freedom to apply their prochoice law if either of these bases was present. Prolife states cannot credibly claim *as a matter of conflicts law* that they have a right to have their policies prevail in all cases of concurrent jurisdiction, any more than prochoice states can claim *as a matter of conflicts law* that their policies should prevail if either the abortion takes place within the state or the pregnant woman is a local person.<sup>56</sup> Where policies directly clash — where one state prohibits what the other requires, encourages, or affirmatively licenses — then a single factor must be chosen to divide the spheres of regulation fairly and equally between the contending states.<sup>57</sup>

The problem would be different if there were no such direct clash — if the first state wished to prohibit certain types of conduct, while the second was simply indifferent. In such circumstances, the first state could cast its regulatory net more broadly without impinging upon the policies or preferences of the second.<sup>58</sup> Neither state's policies would be subordinated in cases of concurrent jurisdiction.<sup>59</sup> The necessity for choice arises only where states have inconsistent prefer-

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state. But circumstances may exist in which for constitutional reasons the forum state simply cannot prevent the parties from evading forum law. The internal affairs doctrine, for example, allows a corporation to evade state law simply by incorporating in a state with a favorable law. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). Similarly, individuals are surely entitled to evade a law they dislike by moving elsewhere and establishing a new domicile. States are not constitutionally entitled to do anything they like simply because it prevents evasion of their laws.

56. Of course, each state could make such a claim *as a matter of substantive right*. The prolife state claims that fetuses are entitled to protection in every state, and the prochoice state claims the same for women seeking abortions. My point is that, once such substantive claims are rejected as a matter of constitutional interpretation and the matter is left to the states, both states should realize that the cases must be divided up fairly, with each getting an equal share of cases to regulate.

57. States in theory have some opportunity to bias the division even if they are entitled to nominate only a single connecting factor. The state with the largest population of women of childbearing age might favor using the test of residence; the state with the largest number of abortion clinics would favor using the territorial location of the abortion. I do not address this problem here, because clearly states in fact have wished to regulate territorially even if they have a small number of clinics and a large number of women. The problem has arisen, however, in the context of interstate jurisdiction to tax, where states have used formulas that seem fair on their face (they do not create the risk of multiple taxation) but are biased in favor of assets in which the particular state is unusually rich. See generally BRILMAYER ET AL., *supra* note 10, at 396 (noting that states use different apportionment formulas).

58. This conclusion assumes that states do not, per se, object to other states' applying their laws to things happening locally, purely on the ground that they wish to protect their territory from outside interference. In the international context, states arguably are sensitive in just this way. Here, however, I am assessing offense to the territorial state simply in terms of whether residence state regulation impinges on the territorial state's *substantive* preferences.

59. The criminalizing state's law would not be subordinated where the indifferent state was able to take jurisdiction over the case and fail to prosecute, because each could apply its own law in successive prosecutions.

ences. This whole discussion of concurrent jurisdiction, in other words, hinges on the argument that prioritizing the various connecting factors, singling one out as constitutionally sufficient, truly is necessary because there truly is a clash between the policies of the contending states.

That is the argument to which we turn next. Application of a concerned state's law does not subordinate the preferences of an indifferent state. But where a genuine clash of policies exists, no constitutional reason privileges the state with one particular substantive policy (a desire to prevent abortions) over the other by giving authority to the first if the woman either resides there or obtains an abortion there, but giving it to the second only if both residence and abortion are local. Why, then, should a difference between state laws about abortion fall into the second category of inconsistent regulation, rather than the first? Why is there a direct clash between prochoice and prolife states, so that concurrent jurisdiction is inappropriate?

### III. INTERSTATE PREEMPTION

Advocates of residence-based regulation will probably claim that no direct clash exists. They will contend that the case in which state *A* tells someone to do the opposite of what state *B* requires is rare, and abortion in particular does not present such a problem. If a situation arose, where state *A* prohibited abortion while state *B* required it, the argument might hold, and the territorial compromise would make sense. But abortion is more like a case in which (for example) state *A* requires a label on alcoholic beverages, warning purchasers of health risks, while state *B* does not. A potential defendant can satisfy both states' laws, according to this argument, simply by following the more restrictive law. That means applying the warning label to wine and not having an abortion.<sup>60</sup>

This response, however, misconceives what the right to choose is all about. Obviously, supporters of the right to choice are not advocating requiring abortions, nor are they espousing abortion as superior to childbearing. Many abortion rights proponents find abortion morally troubling but simply feel that the state should leave the decision up to the woman. Some strongly believe that the best solution is better sex education and birth control, so that abortion will not be necessary. Many would be quite appalled at the idea of the state's encouraging abortion, perhaps out of memories of past state abuses such as invol-

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60. Similarly, this argument supports the position that satisfying the laws of all states in the right-to-die context is possible, simply by not exercising the right to die. Right-to-die legislation, after all, does not *require* one to terminate life support systems.

untary sterilization. If there are abortion rights proponents who actually want to encourage women to have abortions, perhaps because of concern about the population explosion, they seem to be few and far between — and very quiet.

The prochoice movement, instead, is about support for choice. State laws that support choice guarantee a certain sort of freedom. A woman should be free to choose whether or not to have an abortion without interference by the state. This is the respect in which two states interfere with one another's policy choices when each seeks to apply its law to the same pregnancy. State *A* wishes to prevent the woman from having an abortion; state *B* wants her to be free to make up her own mind. Both states cannot have what they wish, for the woman cannot satisfy the policy goals of both states. State *B* wants her to decide for herself, and if she makes her decision according to fear of criminal penalties from state *A*, then she will not act in accordance with the policies of state *B*.<sup>61</sup>

Promoting autonomy, in other words, differs from encouraging some particular use to which autonomy might be put. A woman may want to maintain the freedom to have an abortion even though she very much hopes and strongly believes that she will never find herself in an unwanted pregnancy. She might want that freedom from legal interference even though, for religious or moral reasons, she is certain that she would carry an unwanted pregnancy to term. A state, similarly, may want to guarantee those within its borders the right to make their own choices, even though it believes that abortion is morally troubling, medically unfortunate, and a wasteful allocation of health care services. A policy that grants free choice is different from a policy that encourages a particular decision. We have already mentioned the example of the right to die; a state might wish to give terminally ill patients a right to refuse medical treatment or to request physician-assisted suicide without affirmatively seeking to promote exercise of the option. Freedom of speech and religion also provide individuals with a sphere of autonomy in which they can make their own choices.

Consider as a general example the world reaction to the Salman Rushdie incident.<sup>62</sup> Great Britain was offended by Iran's edict penal-

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61. Of course, state *B* is unlikely to prosecute the woman for failure to make up her own mind. But the fact that state *B* imposes no criminal penalties does not mean that state *A*'s prohibition does not thwart state *B*'s policies.

62. Part of the reaction to the Rushdie incident arguably comes from the fact that Iran had no right to regulate Rushdie as a British citizen. But the outrage was not merely based upon the fact that Iran had an inadequate connection to regulate Rushdie's writing. Iran's attempt to punish Rushdie was an affront to the sovereignty of Great Britain, where his activity took place and was protected. World reaction would have been very different if Rushdie had gone to Iran

izing Rushdie's publication of *The Satanic Verses* even though British law did not require him to publish the book. British policy was to provide Rushdie with the choice whether to publish; retaliation for exercising the right to publish directly undermines British sovereignty over its territory.<sup>63</sup> For another nation to penalize the exercise of religious freedom or freedom of speech within the territorial United States would similarly undermine U.S. territorial sovereignty.<sup>64</sup>

When the state chooses not to regulate abortion, it appears to be expressing indifference about whether or not the woman has an abortion. Similarly, a state might be indifferent about whether wine bears a label warning about the dangers of alcohol. But while a state may not care whether the woman has the abortion or not, it is not therefore necessarily indifferent to the circumstances of the abortion decision. It may be indifferent to the *result* of the decisionmaking process while caring very strongly about the process itself. The state essentially manifests a preference that the decisionmaking power be left to the woman.

Here, the biggest danger to the argument might be the apparently tenuous nature of the distinction that I am making between mere indifference and an affirmative desire to preserve the defendant's autonomy. This distinction may seem too slender a reed to bear such constitutional weight. One could argue that state indifference and state desire to preserve a sphere of autonomy are really one and the same. To put it another way, one might think that *every* time a state fails to regulate, it equally grants the freedom to individuals to decide either way; it effectively grants an affirmative license. The "license" characterization, according to this argument, is no more and no less persuasive in the abortion or right-to-die context than in any other situation where a state fails to adopt a law that criminalizes particular behavior.

This concern is misguided. We can easily demonstrate the distinction, and its importance, by turning to *Roe* itself. *Roe* was clearly and unmistakably an affirmative grant of autonomy, not a manifestation of

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and published the book there, or if Iran had sought only to prevent distribution of the book within its borders.

63. The British were also probably offended by the Draconian nature of the penalty; but similar penalties imposed within Iran, such as stoning as a punishment for adultery, have not provoked comparable international outrage.

64. This argument is not inconsistent with the view that free speech encourages publication of ideas so that others can read them, thus enriching political debate, and so forth. Even if one thought that this instrumental purpose was the sole end of free speech, one might well want to pursue it by granting individuals a right to decide for themselves what and whether to publish, because only such freedom can inspire the individual consciousness to produce the sort of valuable works desired.

indifference.<sup>65</sup> One cannot possibly interpret *Roe* as simply holding that federal law is indifferent on the abortion issue, or as simply noting that no federal law criminalizes abortion. If a prolife state legislature, immediately after *Roe*, had passed an antiabortion statute and attempted to defend it on the ground that *Roe* simply manifested federal indifference to whether or not women had abortions — a lack of federal policy on the subject — courts would surely have rejected this strange argument out of hand. If federal policy had been one of indifference, then the Texas statute challenged in *Roe* would not have been overturned; the case would have been dismissed instead for want of a federal question. *Roe* expressed affirmative federal policy on abortion, a policy of leaving the decision to individual women. *Roe*, in other words, has preemptive effect, while mere lack of federal regulation does not.

Thus, a clear difference exists between the policy of indifference and the policy of license. The latter results in preempting a contrary state law, while the former results in no preemption because the state's laws are perfectly consistent. The latter results in invalidation; the former results in dismissal for want of a federal question. There may be cases where determining which of these sorts of policies a particular statute or judicial decision reflects is difficult.<sup>66</sup> When a legislature has simply chosen not to regulate, it may have done so out of either indifference or affirmative policy. But federal abortion policy after *Roe* is not one of these ambiguous situations. The conceptual and operational differences between the two states of affairs are pronounced; clearly, prochoice policies typically constitute affirmative grants of autonomy. Prochoice policies typically have preemptive effect.

The importance of this notion of preemptive effect is illustrated by a situation analogous to interstate preemption, namely federal-state preemption. Federal preemption cases show clearly that a lack of federal regulation *may* conflict with a state decision to regulate but that *it need not*. In order to resolve the issue, one must inquire into the purpose of the federal decision not to regulate and ask what it was designed to achieve. Where the federal government chooses not to regulate but the state decides to regulate, then state regulation will be preempted if the federal failure to regulate constitutes a decision that the individual should be left free to make his or her own decision.

Territoriality trumps residence; but residence law is invalidated only if the two are in actual conflict. Federal law, similarly, trumps

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65. A federal freedom of choice bill would also be an affirmative grant.

66. For example, how should one characterize a legislature's failure to criminalize possession of small amounts of marijuana?

state law, but only if the two are in actual conflict. The point of examining the federal preemption analogy is to show that, while determining whether there really is an inconsistency is sometimes difficult, the inquiry is a meaningful and manageable one.

#### IV. FEDERAL PREEMPTION

Federal preemption of state law results from the Supremacy Clause of Article VI, which makes federal law the supreme law of the land.<sup>67</sup> Where Congress possesses a valid basis for federal regulation, such as the Commerce Clause, its exercise of that power may result in invalidation of state law on the same topic. Preemption is primarily a product of congressional intent, and determining whether state law is preempted involves an exercise in statutory construction.<sup>68</sup> Whether the state law regulates an area of traditionally strong state interest does not matter, for federal law is automatically superior.<sup>69</sup> Yet federal regulations do not automatically preempt state law on the same topic merely because the state law is more restrictive.<sup>70</sup>

Traditionally, the Court has recognized three ways congressional action may preempt state law. First, Congress may explicitly define the extent to which it intends to preempt state law.<sup>71</sup> Second, even where Congress has not explicitly indicated a desire to preempt, it may indicate a desire to occupy the entire field.<sup>72</sup> The third category is the most relevant to interstate preemption analysis, although in theory the first two might potentially apply.<sup>73</sup> Under the third category, state law is preempted to the extent that it actually conflicts with federal law.<sup>74</sup> This can occur either when simultaneous compliance with both laws is impossible<sup>75</sup> or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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67. U.S. CONST. art. VI, cl. 2. For an analysis of federal preemption in choice-of-law terms, see Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEXAS L. REV. 1743 (1992).

68. See, e.g., *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 152 (1982).

69. *Fidelity*, 458 U.S. at 153.

70. See, e.g., *English v. General Elec. Co.*, 496 U.S. 72, 89 (1990) (citing *California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989)) ("[o]rordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law").

71. *Michigan Cannery & Freezers Assn. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983)).

72. *Michigan Cannery & Freezers*, 467 U.S. at 469 (citing *Fidelity*, 458 U.S. at 153, and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

73. This article focuses on affirmative license as a basis for interstate preemption, but other bases for federal preemption could also be relevant in interstate preemption cases.

74. *Michigan Cannery & Freezers*, 467 U.S. at 469.

75. 467 U.S. at 469 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

Congress."<sup>76</sup>

The proviso that complying with both federal and state law need not literally be impossible is important. In *Franklin National Bank v. New York*,<sup>77</sup> the Court found a clear conflict between a federal law authorizing national banks to receive savings deposits and a New York law that forbade such banks to use the word *savings* in their advertising or business. Yet federal law did not specifically permit, let alone require, that national banks advertise; thus, conforming to both sets of laws was clearly possible. Only in rare cases does federal law require individuals to do something prohibited by state law, or vice versa.<sup>78</sup> If "actual conflict" were limited to such circumstances, courts would find preemption much less frequently than they do.

What, then, does actual conflict consist of? Larry Tribe lists two categories. First, "state action must ordinarily be invalidated if its effect is to discourage conduct that federal action specifically seeks to encourage."<sup>79</sup> Tribe offers as an example *Nash v. Florida Industrial Commission*,<sup>80</sup> in which state law denied unemployment benefits to persons who had filed complaints with the NLRB. Second, "[s]tate action may . . . be preempted as interfering with federal regulation if it encourages conduct whose absence would aid in the effectuation of the federal scheme as interpreted and applied."<sup>81</sup> Here, Tribe cites *City of Burbank v. Lockheed Air Terminal Inc.*,<sup>82</sup> in which the court found a city ordinance prohibiting late night takeoffs to conflict with FAA policies of insuring airport safety and efficiency that necessitated flexibility in scheduling.

A third category, which Tribe does not specifically delineate, bears some resemblance to the second. State law will be preempted where it conflicts with federal policy designed to provide individuals with the flexibility or autonomy to make their own decisions. *Fidelity Federal Savings & Loan Association v. de la Cuesta*,<sup>83</sup> like *City of Burbank*, dealt with a federal policy encouraging flexibility. California banking regulations prohibited banks from enforcing "due on sale" clauses in residential mortgages in most instances. The Court held this regula-

76. 467 U.S. at 469 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

77. 347 U.S. 373, 378 (1954).

78. See, e.g., *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (state and federal law imposed inconsistent labeling requirements).

79. TRIBE, *supra* note 28, at 482-83.

80. 389 U.S. 235 (1967).

81. TRIBE, *supra* note 28, at 485.

82. 411 U.S. 624 (1973).

83. 458 U.S. 141 (1982).

tion to conflict with regulations of the Federal Home Loan Bank Board.

The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances" . . . [T]he California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.<sup>84</sup>

Just as federal law may give a bank or an individual the flexibility to decide either way, so may federal law also be a grant of autonomy. *Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Board*<sup>85</sup> illustrates this principle. The federal Agricultural Fair Practices Act<sup>86</sup> had been enacted to enable individual farmers to join together voluntarily in cooperative associations to protect their bargaining position against powerful agricultural processors. The Act made it unlawful for either processors or producers' associations to coerce any producer "in the exercise of his right to join . . . or to refrain from joining" a producers' association.<sup>87</sup> The Michigan statute in question established a state-administered system that organized producers' associations and certified them as exclusive bargaining agents for all producers of some particular product. A group of asparagus growers challenged the Michigan Act, and the Supreme Court found that it was preempted.

The Court acknowledged that the federal Act contained no preemptive language; indeed, the Act explicitly stated that it should not be construed to change or modify existing State law.<sup>88</sup> But the Court accepted the growers' argument that, although the chief purpose of the federal act was to facilitate formation of agricultural cooperatives, it was also designed to preserve the free choice of producers to join cooperatives or not, as they saw fit.<sup>89</sup>

Congress' intent to shield producers from coercion by both processors and producers' associations is confirmed by the legislative history of the AFPA, which reveals that the question of the producer's free choice was a central focus of congressional attention . . . . [I]n passing [the Act], both the House and the Senate unequivocally expressed an intent to pro-

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84. 458 U.S. at 155 (quoting 12 C.F.R. § 559.9(f)(1) (1982)).

85. 467 U.S. 461 (1984).

86. 7 U.S.C. § 2301-2306 (1989).

87. 7 U.S.C. § 2303(a) (1989).

88. 467 U.S. at 469 (citing 7 U.S.C. § 2305(d) (1989)).

89. See 467 U.S. at 470-71 (describing the argument and then agreeing with it).



hibit producers' associations from coercing a producer to agree to membership or any other agency relationship that would impinge on the producer's independence.<sup>90</sup>

It did not matter to the Court that complying with both the state and the federal acts was technically possible.<sup>91</sup>

The federal-state preemption analogy illustrates that a clash may exist even if federal law does not require what state law prohibits. But it also shows that the category of "direct clash" is not as large as might at first appear; it does not include all cases in which federal law supports the claim of one party while state law supports the claim of the other. On a spectrum, the degree of inconsistency between the law of jurisdiction *A* and jurisdiction *B* decreases as one moves from left to right. At the far left side, the two laws actually require the same result. At the far right, the two laws require inconsistent conduct — *A* requires what *B* prohibits. Between these two extremes, one can satisfy both laws by obeying the more restrictive of the two. But in federal preemption, federal law nonetheless invalidates state law in some cases in this intermediate group. Similarly, a direct conflict exists between the two states' laws in some of these cases in the middle. I would argue that in these cases the law of one state must give way and, furthermore, that state prochoice laws typically fall into that category. There is no question, of course, that federal statutory law designed to protect freedom of choice would preempt state laws prohibiting abortion. *Roe v. Wade* had exactly that effect, for the same reason. Undeniably, then, an inconsistency exists between residence states' laws that prohibit abortion and territorial states' freedom-of-choice statutes or *Roe*-like judicial decisions.

Federal preemption results from two factors: first, the existence of a hierarchy, which gives federal law priority over state law; second, a finding of conflict. Without hierarchy, conflict does not necessitate preemption because one cannot know which of the two inconsistent legal rules to preempt. As I have explained, prioritizing the contending laws must be possible. Without conflict, however, hierarchy does not matter, because both jurisdictions can regulate concurrently. In the federal context, the Supremacy Clause clearly establishes hierarchy. Federal preemption analysis, then, must focus on the second element, for the difficult issues will concern whether a conflict exists that will eliminate the possibility of concurrent jurisdiction.

In the interstate context, hierarchy depends on the fact that the

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90. 467 U.S. at 471, 477.

91. See 467 U.S. at 478 n.21.

territorial state takes priority over the state of residence.<sup>92</sup> As in federal preemption, then, difficulties are more likely to center on whether there is a conflict. I am not claiming here that federal-state and interstate preemption are identical; they may very well differ in some respects.<sup>93</sup> But they are similar in that both hinge on whether concurrent jurisdiction is appropriate, for in both an established hierarchy specifies what to do when only one state can regulate. Concurrent jurisdiction turns on whether a conflict exists; the federal preemption cases illustrate that a conflict exists between state laws that seek to regulate certain behavior such as abortion and those that seek to grant an individual the autonomy to make up her own mind.

## V. INTERSTATE PREEMPTION AND ABORTION

While this examination of preemption cases illustrates the general principle underlying interstate preemption, there is one clear problem with applying the analysis directly. The interstate context differs from the federal-state context in an important respect: states rarely have a chance to review one another's statutes, so we rarely have direct evidence that the territorial state finds its own statute inconsistent with the law of the state of residency. We are asking the residence state not to prosecute an abortion taking place in a state where abortion is legal so long as the legality of abortion in the territorial state reflects an affirmative policy granting autonomy rather than mere indifference. But how is the residence state supposed to ascertain what the territorial state's policy is, absent a declaration by the territorial state on the consistency of the two laws? In the federal-state context, this problem is resolved through the mechanism of Supreme Court review. A state

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92. See *supra* Part II.

93. For instance, one could argue that the reasons for federal supremacy over the states are stronger than the reasons for territorial supremacy over residence state law. Even if this is true — if federal law is more “strongly preemptive” than territorial law — it does not matter, for my argument only requires that territorial law be hierarchically superior, not that it be *as hierarchically superior to residence state law as federal law is to state law*. Obviously, federal law is “even more superior,” for it has the power to preempt territorial *as well as* residence law.

Whether the fact that territorial law is less strongly preemptive than federal law should ever make a difference is unclear. One possibility is that, where it is unclear whether the two laws conflict, one should presume conflict in the case of federal-state preemption but presume no conflict in the case of interstate preemption. This position hinges on the assumption that errors of wrongfully finding that a conflict exists are more costly in the interstate than in the federal-state context, while errors of wrongfully finding that a conflict does not exist are more costly in the federal-state than in the interstate conflict. Conversely, one might argue that conflict should be presumed in the interstate context, but not where federal-state preemption is at issue, on the ground that one should not presume that Congress sought to override state policy choices. Cf. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400-06 (1991) (holding that, for structural reasons of federalism, Congress imposed federal law on state hiring practice only where Congress made a clear statement).

court might face great difficulty if it had to determine, without any guidance from the federal government, whether federal silence preempted its regulation. But state courts do not experience such problems; for if they make mistakes, the Supreme Court, sitting as the authoritative expositor of federal law, can correct them.

Things are not so easy in the interstate context. Assume that state *A* prohibits abortion. State *B*, where the abortion took place, does not. Our analysis requires state *A* to determine the policy behind state *B*'s position. But it has less authoritative guidance than it would have if it were facing a federal preemption issue, and no possibility of corrective review.<sup>94</sup> How, then, is state *A* supposed to decide whether the laws of state *B* have the capacity to preempt its own laws? For one state to interpret another's laws when they are ambiguous or unclear is always difficult. I noted earlier that *Roe* itself clearly has preemptive capacity. One way of phrasing the question, then, is to ask whether state *B*'s law is like *Roe*; if it is *Roe*-like, then it will preempt the law of state *A*. This leads us to ask what about *Roe* makes its preemptive capacity so clear. There are several answers.

The first answer stems from the sorts of considerations that motivated the decision. *Roe*, like the state freedom-of-choice provisions I will examine below, was motivated by the desire to offer women greater reproductive freedom. In the statutory context, one can sometimes demonstrate this desire by legislative history, sometimes by the wording of the statute recognizing the right, and sometimes by the identity of the groups lobbying on behalf of the statute. In the judicial context, one looks at the decision's underlying rationale.

The second sort of evidence consists of other situations in which the statute or decision has preemptive effect. We may not have direct evidence that state *B* would believe its law preempts other states' abortion prohibitions, because of the lack of interstate appellate review. But other sorts of preemption may reveal *B*'s intent. For example, if there is a state constitutional provision preserving the freedom of choice it will invalidate state statutes and municipal ordinances. Its preemptive effect should extend to prolife laws of other states. Similarly, the preemptive effect of a state statute that prohibits common law or municipal regulation of abortion surely rests on more than mere indifference; it must stem from an affirmative desire to grant a right of choice.<sup>95</sup> Conflicting statutes of other states are likely to be

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94. One possible method of review would be interstate certification under which states would request rulings from other states on unclear issues of law. See generally John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988).

95. In the city of Corpus Christi, Texas, for example, a right-to-life provision was put to

preempted for the same reason. With these two points in mind, we can take a brief look at some particular examples of state abortion laws.

States vary greatly in their approaches to abortion.<sup>96</sup> Some have declared a desire to protect fetal life to the maximum degree constitutionally permissible; others have sided with the right of the pregnant woman to choose. The precise contours of a state's abortion law will influence the extent to which it preempts the differing laws of the woman's residence. The laws of the states can be arranged on a spectrum, presented in Figure 1, varying from those with no preemptive effect on the abortion prohibitions of other states to those with clear preemptive effect. At the first extreme we find states that have themselves chosen to prohibit abortion; clearly the statutes do not clash with other antiabortion states' laws, and thus there is no preemption. Utah and Louisiana, for example, fit into this category.<sup>97</sup>

At the other end, we find states with constitutional provisions that protect the right to choose.<sup>98</sup> Ten states have express constitutional provisions that protect the right to privacy: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington.<sup>99</sup> None of these constitutional provisions, however,

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popular vote. See *AntiAbortion Measure Rejected in Corpus*, N.Y. TIMES, Jan. 21, 1991, at A18. Although it was defeated in a referendum, *id.*, one can imagine what would have happened had it passed. If Texas state law was *Roelike*, then the municipal provision would have been invalid; but if Texas law merely failed to take a position on the question, the provision would have survived. Cf. *Robin v. Hempstead*, 329 N.Y.S.2d 678 (N.Y. App. Div.) (holding that a local ordinance restricting abortions to hospitals was outside the municipality's scope of power as state statute recognized some nonhospital abortions as lawful), *affid.*, 281 N.E.2d 844 (N.Y. 1972); *Kim v. Orangetown*, 321 N.Y.S.2d 724 (N.Y. Sup. Ct. 1971) (holding unconstitutional a local law restricting performance of abortions to hospitals on grounds that it prohibited abortions permitted by state statute).

Another sort of preemption occurs when a later statute appears to conflict with an earlier statute. Here, as in other examples, preemption requires both inconsistency and hierarchy. The fact that the later in time trumps the earlier provides hierarchy. But inconsistency must still be shown, and the mere fact that the two rules point toward opposite results is not enough.

To demonstrate this point, assume that state *A* has both a law invalidating contracts that minors enter into and a more recent law declaring surrogacy contracts enforceable. If an underage woman enters into a surrogacy contract, we would presumably want to say that both laws validly apply to her case and that the contract is invalid. The first law qualifies the second. The latter statute does not trump the former — both are still in effect, and the contract would be invalid.

96. A valuable general survey of state abortion provisions is found in NATIONAL ABORTION RIGHTS ACTION LEAGUE FOUNDATION, WHO DECIDES? A STATE-BY STATE REVIEW OF ABORTION RIGHTS (3d ed., 1992); see also Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 417-33, 446-50 (noting several state provisions).

97. See LA. REV. STAT. ANN. § 14:87 (West Supp. 1992); UTAH CODE ANN. § 76-7-302 (Supp. 1992).

98. See Pine & Law, *supra* note 96, at 433-34. If any states actually required abortions in certain circumstances, they would be even further to the left, but none do.

99. Seven of the ten have relatively broad privacy guarantees. See ALASKA CONST. art. I,

FIGURE 1

domicile prohibits, territorial state requires	domicile prohibits, territorial state authorizes	domicile prohibits, territorial state indifferent	domicile prohibits, territorial state prohibits
(no states in this category)	(e.g., Maryland, Connecticut)	(e.g., North Carolina?)	(e.g., Utah, Louisiana)
interstate preemption ←		→ no interstate preemption	

is expressly framed in terms of a right of reproductive choice.<sup>100</sup> In some of these states, such as California and Washington, the state supreme court has interpreted the privacy provision to protect a woman's right to terminate her pregnancy.<sup>101</sup> The courts of yet another group of states have recognized a state constitutional right to abortion even absent any express right to privacy; the right is grounded in other constitutional sources.<sup>102</sup> In all of these circumstances, the obvious object of the constitutional protection is to grant freedom of choice; state law is not simply indifferent as to whether abortions occur, but affirmatively licenses the woman to decide for herself whether to have an abortion.

Next to these situations on the spectrum are those states with no express constitutional protections but with statutory provisions that protect a woman's right to choose.<sup>103</sup> Connecticut and Maryland fall into this category.<sup>104</sup> Maryland qualifies the right in various ways, particularly for minors; a right to choose exists, but it applies only in certain circumstances. In those circumstances, however, these states

§ 22; ARIZ. CONST. art. I, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; MONT. CONST. art. I, § 10; WASH. CONST. art. I, § 7. The constitutions of the three remaining states mention a right to privacy. See ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10. However, the extent to which these provisions are intended to govern the right to abortion remains less clear.

100. Legislation in at least one of these states, however, restricts the right to choose, suggesting that the privacy protection in that state does not extend to abortion rights. See Montana Abortion Control Act, MONT. CODE ANN. §§ 50-20-101 to -112 (1985).

101. See *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *State v. Koome*, 530 P.2d 260 (Wash. 1975); cf. *Opinion of the Justices*, 465 A.2d 484 (N.H. 1983). New Hampshire recognizes a right of privacy relating to bodily integrity in somewhat similar situations.

102. See, e.g., *Harris v. State*, 356 So. 2d 623 (Ala. 1978); *People v. Norton*, 507 P.2d 862 (Colo. 1973); *People v. Frey*, 294 N.E.2d 257 (Ill. 1973); *Helvey v. Rednour*, 408 N.E.2d 17 (Ill. App. Ct. 1980); *Przybyla v. Przybyla*, 275 N.W.2d 112 (Wis. Ct. App. 1978).

103. See *Pine & Law*, *supra* note 96, at 448-49, for a discussion of state statutes.

104. CONN. GEN. STAT. ANN. § 19a-602(a) (West 1992); MD. HEALTH-GEN. CODE ANN. § 20-209 (1992).

clearly grant a pregnant woman the right to decide for herself. The policies are clear; these rules would preempt antiabortion laws at the lower levels of local government.

Indeed, the very fact that the state has taken affirmative steps to declare a right of reproductive privacy, as these three states have, demonstrates that it is not merely indifferent. If it were indifferent, it would have no reason for action; instead, the state would simply decline to adopt legislation prohibiting abortion. The fact that the state has taken action suggests that it intends to protect the right to choose. Although the constitutional or statutory declaration of a right to choose does not compel a citizen to take any particular action — in this sense, it is indifferent to whether or not women have abortions — the law is not indifferent about the issue of reproductive freedom. Furthermore, while such a declaration does not require any particular action by citizens, it does require certain sorts of responses by state officials. A constitutional or statutory declaration clearly requires them not to interfere with the reproductive choices of pregnant women. This is the purpose of such declarations, and this purpose is the source of their preemptive effect.

Most states adopt neither of the two extreme positions, neither entrenching a right of choice in explicit legislation or constitutional provision nor declaring a desire to prohibit abortions wherever possible. In a sense, one might characterize these middle states as perpetuating something of a legal “vacuum” on the issue; they appear simply to fail to regulate. The “vacuum” need not be total, however; no state in the Union, apparently, has a complete absence of law on the topic of abortion.<sup>105</sup> Most regulate one aspect of the issue or another (by requiring parental notification, by imposing waiting periods, by prohibiting clinic harassment, by providing or denying public funding, and so forth). But many states seem to exist in a vacuum with regard to the other, unregulated, issues. How are we to assess the preemptive effect of the state’s failure to regulate in these residual areas?

New York provides an interesting example. If one looks at some provisions of New York statutory law, New York may simply appear indifferent. Two provisions exemplify this seeming indifference. First, under New York law, no abortion may be performed after the twenty-fourth week of pregnancy unless necessary to preserve the life of the woman.<sup>106</sup> Second, public funding is available for abortions, but only

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105. For instance, most states differentiate between pre- and postviability abortions. *See, e.g.,* MASS. GEN. L. ch. 112, § 12L-12M (1990); N.C. GEN. STAT. § 14-45.1 (1992); R.I. GEN. LAWS § 11-23-5 (1981).

106. N.Y. PENAL LAW § 125.05(3) (McKinney 1987).

if they are medically necessary.<sup>107</sup> Neither of these provisions gives much indication of the New York position on the vast range of cases. Does New York fail to regulate most cases because it wishes to preserve freedom of choice, or because it has simply failed to criminalize abortion altogether? The answer is suggested by a 1972 case, *Byrn v. New York City Health & Hospitals Corp.*,<sup>108</sup> upholding a pre-*Roe* liberalized abortion law on the grounds that the fetus was not a person within the meaning of the state or federal constitution. The woman's right to choose was suggested by the fact that New York law did not recognize the fetus as a legal person.

Oregon presents another interesting example. Like New York, it neither categorically supports a right to choose nor prohibits abortions. It thus apparently has a legal vacuum on the subject. However, Oregon law does seem to favor freedom of choice in other respects. First, Oregon law does not prohibit postviability abortions, as some states do.<sup>109</sup> Second, the Oregon Supreme Court prohibits clinic harassment.<sup>110</sup> Third, public funding is available in many circumstances (as where the life or physical or emotional health of the mother is endangered).<sup>111</sup> Hospitals owned by the state or its subdivisions may not refuse to perform abortions.<sup>112</sup> These conditions strongly support the existence of a prochoice policy. North Carolina, in contrast, provides an example of greater ambiguity. The state does not prohibit abortions during the first twenty weeks of pregnancy, and it provides public funding in many circumstances.<sup>113</sup> But no relevant case law supports or even addresses the question of whether a woman has the right to choose or whether the state should protect clinics from harassment.

The most difficult cases, like North Carolina, arise where the state

107. N.Y. SOC. SERV. LAW § 365-a(2) (McKinney 1987).

108. 286 N.E.2d 887 (N.Y. 1972), *appeal dismissed*, 410 U.S. 949 (1973); *cf.* Schulman v. New York City Health & Hosps. Corp., 355 N.Y.S.2d 781 (1974) (holding requirement to file fetal death certificate not invasion of privacy), *affid.*, 342 N.E.2d 501 (1975). *See also supra* note 95 (citing New York cases in which local antiabortion ordinances were held preempted).

109. Compare, for instance, the law of Wyoming in this respect. WYO. STAT. § 35-6-102 (1977) (prohibiting postviability abortions "except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment.").

110. *See* State v. Clowes, 801 P.2d 789 (Or. 1990) (holding that Oregon legislature made considered decision to permit abortion; choice-of-evils defense to clinic harassment is invalid because abortion decision is between a woman and her doctor).

111. *Cf.* Planned Parenthood Assn. v. Department of Human Resources of Or., 663 P.2d 1247 (Or. Ct. App. 1983) (holding that state constitution *protects* right to funding for medically necessary abortions), *affid. on other grounds*, 687 P.2d 785 (Or. 1984).

112. OR. REV. STAT. § 435. 475(3) (1991).

113. *See* N.C. GEN. STAT. § 14-45.1 (1992); N.C. GEN. STAT. § 108A-55 (1992).

regulates abortion to some degree but does not expressly declare in the remaining cases whether the failure to regulate rests on a right to choose. One must simply look at the relevant legislative and judicial sources in the same way that one examines such sources for any problem of statutory interpretation. Does legislative history clarify the reasons for state inaction? Was an effort to prohibit abortion defeated on an explicit reproductive freedom rationale? Does statewide law preempt local ordinances (in which case preemptive effect is clear)? Do judicial decisions rely upon a right to reproductive choice? While the question is not reducible to any mechanical process, the general enterprise is familiar. This is how courts always undertake to construe statutes. A state that fears its policies will be misconstrued can take explicit action to clarify the intent behind its failure to regulate.<sup>114</sup>

## VI. THE RIGHT TO DIE: SOME SPECULATION

In some respects, the right-to-die problem is not very different from the problem of the right to choose. The issue revolves around the extent to which a state may apply its law to activities that occur outside its borders, especially where the activity in question — here the decision to die — is one that some states affirmatively protect. As in the abortion context, a direct clash occurs between the policy of the state that wishes to offer this choice and the state that wishes to foreclose it. In this respect, the analysis of the right to choose can be extended to cover the right to die.

In other respects, however, the right to die differs. First, the right to die is more likely to involve regulation of nonresidents; for instance, the doctor involved in a physician-assisted suicide in state *B* may not be a resident of state *A*, the state seeking to prohibit the practice. With the actual resident, the suicide victim, now deceased, state *A* might seek to penalize the doctor; but no obvious basis for application of local law exists.<sup>115</sup> In the abortion context, conversely, we assumed

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114. States have in some instances adopted legislative declarations clarifying whether they are prochoice or prolife. These are useful guides to statutory interpretation. For example, Connecticut has indicated a prochoice stance. See CONN. GEN. STAT. ANN. § 19a-602 (West Supp. 1992) (enacted 1990). Missouri on the other hand has enacted an antichoice legislative declaration. See MO. ANN. STAT. § 188.010 (Vernon Supp. 1992) (enacted 1974, amended 1986), § 1.205 (Vernon Supp. 1991) (enacted 1986).

115. The state might argue that it could penalize the doctor because the doctor advertised in the state, practiced medicine on other occasions in the state, or knew that the patient was from the state. Cf. *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.) *cert. denied*, 414 U.S. 856 (1973) (civil case holding a doctor to local unlimited damages law, and relying on similar connecting factors). In the present context, reliance on such factors is problematic because multiple bases for jurisdiction create the possibility of concurrent jurisdiction. Because the law of place of the medical procedure trumps other states' laws in case of a direct clash, these other connecting factors would be invalid bases for jurisdiction.



that the woman was a resident of state *A*, and thus the residence principle provided a basis for jurisdiction. For the right to die to present a clash between two states' policies, some connection must exist between the two states and the controversy sought to be regulated.

Such a connection may exist where a patient wishes to leave the state in order to end her life. This points out a second difference between abortion and the right to die: if the patient is currently hospitalized, the state is in a better position to prevent travel altogether than in the abortion context. This is particularly true if the patient is not conscious and her guardians wish to have her released from the hospital. In such circumstances, the state will claim that it is not applying its law extraterritorially; the abortion analogy thus does not hold. Indeed, the abortion analogy seems to support the state's right to prevent death in this context, because it emphasizes the preeminent right of the territorial state to regulate.

This argument highlights a third difference between the right-to-die and freedom-of-choice issues. Ordinarily, the pregnant woman has control over the fetus; she can take it from state to state without first obtaining official permission. The state typically exercises a much greater degree of control over the relationship between the patient and her guardians. This difference contributes to the sense that the state is in a better position to interfere in the right-to-die than in the abortion context. It also suggests that differences may exist between the right to physician-assisted suicide (where the patient is conscious and does not have a guardian) and the right to termination of life support systems for an unconscious individual.

Despite these differences, my analysis of the right to abortion extends in large part to the right to die. Considering a series of different right-to-die scenarios will illustrate the similarity.

In the first case, a patient currently of sound mind but fearful of the ravages of her terminal illness goes to another state to seek physician-assisted suicide, which is legal in that state. Her husband accompanies her. Their state of residence does not recognize a right to die; the physician and the husband would thus be criminally liable if residence law were applied. This case parallels the typical abortion example. For reasons outlined in the discussion of abortion, the home state is not entitled to attempt to stop the patient from ending her life, nor is it entitled to prosecute the husband on his return.<sup>116</sup>

In the second case, the woman again seeks to travel elsewhere to

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116. See *supra* Part II. Note that the husband must show, essentially, that he has third-party standing to raise his wife's right to choose, because the territorial state extended the affirmative license to decide either way not to him, but to her. The decision whether to allow third-party

end her life, but her home state seeks to restrain her from leaving. Here, the state does not seem to be regulating extraterritorially; the woman is still within state boundaries. I would nonetheless claim that the state cannot keep her from leaving. At this point, the right to travel enters the picture. For the state to bar its citizens, generally, from leaving the state would violate the right to travel. The only way for the state to differentiate this case from the general situation where one has a right to leave would be for the state to argue that this leaving would be in furtherance of a crime (taking one's life). But because taking one's life in another state that explicitly recognizes a right to die cannot be criminalized, this argument fails. The right to travel therefore protects the individual who wishes to leave to take her own life.

The third example is the most difficult. Here, the patient is in a permanent vegetative state, and the guardian wishes to remove her to a locale that recognizes the right to die. The home state may be able to defeat the right-to-travel argument by arguing that it is not preventing the woman from exercising her right to travel, but simply holding that her guardian is not entitled to make the decision for her. Here, however, we need to take a closer look at the state's guardianship law. What decisions, exactly, is the guardian ordinarily entitled to make? Assume that the state would normally allow the guardian to move the patient from one hospital to another in order to obtain different treatment. In such circumstances the state should not be able to prohibit the guardian from moving the patient to another state on the grounds that the purpose of the move is illegal. For the purpose itself is not illegal; termination of life support would be permitted if the patient were already in that state.

These arguments support a rather broad right to leave the state to terminate one's life. The only argument the state can use to prevent the death would be the contention that the guardian could not decide to move the patient regardless of the illegality of the motive. One can certainly imagine states holding such a limited view of guardianship; in such states, the guardian would be prohibited from taking the patient out of the hospital for virtually any reason. In most circumstances, however, the right to travel would entail an interstate right to die.

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standing would not differ from the decision whether to allow third-party standing if federal law granted a right to die but a state sought to criminalize the husband's assistance.

### CONCLUSION

Nothing intrinsic to the issue of abortion makes state failures to regulate invariably preemptive. Given some circumstances, states might simply fail to regulate abortion because they were indifferent as to whether pregnancies are carried to term or not. In such a world, lack of regulation would have no preemptive significance; the residence state might apply its law to abortions without offending the policies of the territorial state.

But considerably more may be at stake in the world we now inhabit. The regulation of abortion has generated enormous controversy for many years. The decision not to regulate abortion is a considered one that usually, if not always, manifests a policy of leaving the choice to the woman. The decision is in many or most cases motivated by the specter of state regulation and entails a conscious rejection of that option. In these cases, the territorial state's freedom of choice trumps the residence state's restrictions. Thus, constitutional law in the territorial state unambiguously preempts residence state law, for a constitutional provision cannot be interpreted as reflecting mere indifference to the issue; it must be understood as an entrenched grant of autonomy. There is no other reason for adopting a constitutional provision. State statutory law that recognizes reproductive autonomy preempts contrary residence state law for the same reasons that it preempts local or municipal law or state common law. State common law, similarly, preempts residence state law if it would preempt local or municipal law.

Preemptive effect is the exception in conflict of laws, not the norm. Typically, residence state law does not interfere with the prerogatives of the territorial state, thus avoiding the need for preemption. The territorial state's failure to regulate usually shows nothing more than a lack of concern whether particular sorts of activities occur. Thus, where the territorial state takes no position on the issue, the residence state may exercise concurrent jurisdiction. In the usual case, then, the defendant's state of residence may apply its law to regulate conduct undertaken in other states. But abortion, as in so many other respects, is not the usual case.